LIM THIAN SIANG

v.

BURSA MALAYSIA SECURITIES BHD & ANOR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
RAVINTHRAN PARAMAGURU JC
[CIVIL CASE NO: BKI-13JR-23/9-2012]
18 DECEMBER 2012

ADMINISTRATIVE LAW: *Judicial review - Application for - Extension of time - Whether reasonable explanation given for delay - Whether delay caused serious repercussions to public interest - Whether extension allowed - Rules of Court 2012, O. 53 r. 3(6)*

JURISDICTION: *High Court - Distinct territorial jurisdiction - Impugned decision made in Kuala Lumpur - Whether High Court of Malaya or High Court of Sabah and Sarawak seized with jurisdiction to hear application - Courts of Judicature Act 1964, s. 23(1)(a), (b) & (c)*

This was an application for leave to apply for an order of *certiorari, mandamus* and declaration under O. 53 of the Rules of Court 2012 ('ROC'). The applicant was a minority shareholder of Kretam Holdings Bhd ('KHB'). KHB issued new ordinary shares and irredeemable convertible preference shares to finance the purchase of all the shares in Abedon Sdn Bhd, Green Edible Oil Sdn Bhd and Palm Products International Alliance Sdn Bhd at RM2.30 each. On 9 August 2011, the first respondent deemed that KHB had fully-complied with the Main Market Listing Requirements. The applicant complained to the first respondent that the issuance of the new shares at RM2.30 each was too low as the landed assets of KHB had not been re-valued when the price was fixed. When the complaint was not acted upon, the applicant wrote to the second respondent, the supervising authority of the first respondent, on 22 August 2011. The second respondent replied on 1 August 2012 that the corporate exercise undertaken by KHB did not require their approval. In the instant application the applicant applied for the following reliefs, *inter alia*, extension of time under O. 53 r. 3(6) of the ROC to apply for an order of *certiorari*.

Held (dismissing application):

(1) Order 53 r. 3(6) of the ROC provides that an application for judicial review should be made within three months when the grounds of application first arose or when the decision is first communicated to the applicant. However, the court can extend time if there is good reason for doing so. (para 6)

(2) On the facts of the instant case, the applicant had not given any reasonable explanation for the delay. He merely listed in chronological order his action in writing numerous letters of complaint to the first and second respondents. Since he was aware of the decision of the first respondent, he should have filed his leave application while waiting for the response from both the respondents. (para 6)

(3) The purpose for the time limit to commence judicial review actions is that, challenges to actions of a statutory character may have serious repercussions to the public interest. In the present case, the new shares whose valuation was challenged had already been listed pursuant to the approval of the fist respondent and it may cause serious repercussions to the Malaysian Capital Market. Therefore the application for the extension of time was dismissed. (para 6)

(4) The cause of action and the facts on which the proceedings were based accrued in Kuala Lumpur and the respondents had no place of business in Sabah and Sarawak. Hence, under limbs (a), (b) and (c) of s. 23(1) of the Courts of Judicature Act 1964, the High Court of Malaya is seized with jurisdiction to hear the instant judicial review application and not the High Court of Sabah and Sarawak. (paras 8 & 9)

Case(s) referred to:
Fung Beng Tiat v. Marid Construction Co [1997] 2 CLJ 1 FC ***(refd)***
Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 23(1)
Industrial Relations Act 1967, s. 20
Rules of Court 2012, O. 53 r. 3(6)
Rules of the High Court 1980, O. 53

For the plaintiff - In person
For the 1st defendant - Rebecca Thong; M/s Szetu & Co
For the 2nd defendant - Sa'adah A Aziz; M/s Lee & Aziz
For the Federal Attorney General - Nor Aimi; FC

Reported by S Barathi

JUDGMENT

Ravinthran Paramaguru JC:

[1] This is an application for leave to apply for an order of *certiorari*, *mandamus* and declaration under O. 53 of the Rules of Court 2012. The application is opposed by the Federal Attorney General as well as the respondents.

Brief Facts

[2] The applicant is one of the two beneficiaries of the estate of his father. The other beneficiary is his brother. He is not a party to this application. The estate of the applicant's father includes 10,000 shares of Kretam Holdings Berhad. The said public listed company acquired all the shares in three companies, namely Abedon Sdn Bhd, Green Edible Oil Sdn Bhd and Palm Products International Alliance Sdn Bhd for the total consideration of RM511,500,002. To finance this purchase, Kretam Holdings Berhad issued new ordinary shares and irredeemable convertible preference shares at RM2.30 each. The 1st respondent is the stock exchange where the shares of Kretam Holdings Berhad were listed. In order to be listed in the stock exchange, a company has to satisfy prescribed conditions. In the instant case, the said conditions are known as the Main Market Listing Requirements. On 9 August 2011, the 1st respondent deemed that Kretam Holdings Berhad has fully complied with the Main Market Listing Requirements in respect of the listing and quotation of the new ordinary shares and irredeemable convertible preference shares at RM2.30 each. The basic complaint of the applicant is that the issuance of new shares at RM2.30 was too low. He said that the landed assets of Kretam Holdings Berhad were not re-valued when the price was fixed. The last valuation was allegedly done in 1998. He claimed that the value of the landed assets would have been much higher than the book value implied by the pricing of RM2.30 per share. This affected him as a minority shareholder. He estimated that the shares were worth

at least RM12 per share. He said that the landed assets of the companies what were acquired by Kretam Holdings Berhad were valued at about double the price of the latter. When his complaint to the 1st respondent was not acted upon, he wrote to the 2nd respondent on 22 August 2011 who is the supervising authority of the former to take action. The applicant was informed that 2nd respondent would look into his complaint. On 1 August 2012, the 2nd respondent finally replied that the corporate exercise undertaken by Kretam Holdings Berhad does not require their approval. The letter was signed by its Deputy General Manager and Head for Investor Affairs and Complaints.

Leave Application

[3] The applicant filed the instant application on 18 September 2012. It is intituled as *"inter partes"* application when it should be an *"ex parte"* application. However, nothing much turns on this inconsequential error. The applicant prayed for the following relief:

> 1) That leave be granted to the Applicant, Lim Thian Siang, for extension of time by three (3) months from 20th June 2012 under Order 53 Rule 3(6) of the Rules of Court 2012 to apply for an order of *certiorari* for the purpose stated in prayer (2) herein below.
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> 2) That leave be granted to the Applicant to apply for an Order of *certiorari* to remove into this Honourable Court for the purpose of quashing the decisions or approves of the Bursa Malaysia Securities Berhad, the 1st Respondent herein ("Bursa") to deem Kertam Holdings Berhad's ("KHB") full compliance with the Main Market Listing Requirements ("LR") in the purchase all the shares in the paid-up equity capital in Abedon Sdn. Bhd, Green Edible Oil Sdn. Bhd and in Palm Products International Alliance Sdn. Bhd (Company No.690851-M) for the aggregate purchase consideration of RM511,500,002 million ("Proposed Acquisitions") as having been fulfilled/waived and to subsequently allow the listing and quotation of the corresponding new KHB shares on Bursa's exchange.
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> 3) That leave be granted to the Applicant to apply for a Declaration that Securities Commission Malaysia (SC) has erred in its 1st August, 2012 decisions that Kertam Holdings Berhad (KHB) has not breached any securities law pursuant to the Proposed Acquisitions and that no further action would be taken by either SC of Bursa on the Proposed Acquisitions.

4) That leave be granted to the Applicant to apply for an Order of *mandamus* direction to the Securities Commission Malaysia ("SC") directing the SC to directly and/or through Bursa act on the complaints of the Applicant made on the 22nd August 2011 and 2nd September 2011 against Kertam Holdings Berhad's (KHB) and its advisers' conduct in the purchase of the entire shares in the paid-up equity capital in Abedon Sdn. Bhd, Green Edible Oil Sdn. Bhd and in Palm Products International Alliance Sdn. Bhd for the aggregate purchase consideration of RM511,500,002 million and ensure that this Proposed Acquisitions is not detrimental to the interests of the non-interested minority shareholders.

5) That all necessary and consequential direction and/or orders be made.

[4] The ground of the application for the delay is that the Securities Commission did not inform the applicant of their other decision on his complaints which I had set out above. The ground of application against the 1st respondent:

1. Did not act conformity with the Listing Requirements.
2. The action defied logic and commonly accepted moral standards.
3. That there was procedural impropriety as after the applicant complained to the 2nd respondent, KHB announced that full compliance with Listing Requirements had been fulfilled. The 1st respondent did not inform the applicant that he could have appealed to the Bursa's Appeals Committee.

[5] As against the 2nd respondent, the ground of the application is that the 2nd respondent made a mistake in finding that KHB did not breach any securities law.

Issues

Delay

[6] Order 53 r. 3(6) provides that an application for judicial review should be made within three months when the grounds of application first arose or when the decision is first communicated to the applicant. However, the court can extend time if there is a good reason for doing so. The conditional approval of the 1st respondent was given to KHB *vide* letter dated 9 August 2011. The application for leave was made only about a year later. The

applicant had complained about the approval in a letter to the 2nd respondent before 24 August 2011. In the premises, it must be deemed that the applicant was aware of the decision of the 1st respondent to deem that the KHB had complied with the Listing Requirements. The applicant had not given any reasonable explanation for the delay. He merely listed in chronological order his action in writing numerous letters of complaint to the 1st and 2nd respondent. Since he was aware of the decision of the 1st respondent, he could have filed his leave application while waiting for response from both the respondents. The purpose of the time limit to commence judicial review actions is that challenges to actions of a statutory character may have serious repercussions to the public interest. In the instant case, the new shares in question whose valuation was challenged have already been listed pursuant to the approval of the 1st respondent. As counsel for the 1st respondent submitted it may cause serious disruption to the Malaysian Capital Market. The applicant, however, had not given a good and cogent reason why he chose to write letter after letter to the respondents instead of commencing the leave application within the stipulated time. I shall therefore dismiss the application for extension of time. Delay in applying for judicial review goes to the jurisdiction of the court (see *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123; [2010] 4 MLJ 360). As I have refused extension of time, I shall dismiss the leave application against the 2nd respondent on ground of delay alone.

Jurisdiction

[7] Under s. 23(1) of the Courts of Judicature Act 1964, jurisdiction in respect of civil proceedings is determined by the place:

(a) the cause of action arose;

(b) the defendant or one of several defendants resides or has his place of business;

(c) the facts on which the proceedings are based exist or are alleged to have occurred; or

(d) any land the ownership of which is disputed is situated,

[8] Assuming all the allegations of the applicant are true, the impugned decisions were taken in Kuala Lumpur by the two respondents who are based there. There is no averment that the respondents have a place of business in Sabah or Sarawak. The applicant himself stated in the Statutory Statement that the place of business of the respondents is in Kuala Lumpur. In the premises, under limbs (a), (b) and (c) of s. 23(1), the High Court of Malaya is seized with jurisdiction to hear the instant judicial review application. In *Fung Beng Tiat v. Marid Construction Co* [1997] 2 CLJ 1; [1996] 2 MLJ 413, the Court of Appeal clearly stated that the High Courts of Malaya and that of the High Court of Sabah and Sarawak exercise distinct territorial jurisdiction. The Court of Appeal said as follows:

> First, it is crystal clear from art. 121 of the Federal Constitution that there are two separate High Courts in Malaysia exercising distinct territorial jurisdiction over different geographical areas of the country. There is the High Court in Malaya and there is the High Court in Sabah and Sarawak. Each has jurisdiction over disputes that arise within its territory.

[9] The applicant argued orally by way of analogy that in cases of refusal of the Minister under s. 20 of the Industrial Relations Act 1967 to refer a dispute to the Industrial Court, the Sabah and Sarawak courts have heard judicial review applications. The argument is that the Minister must have made the impugned decision at the headquarters in Kuala Lumpur. However, this argument misses the point that an application for reference to the Industrial Court is made at the local office of the Director General of Industrial Relations. Therefore the Minister under whose purview the office of Director General of Industrial Relations falls can be constructively deemed as having a place of business in Sabah and Sarawak as well. In the instant case, to recapitulate the basic facts relating to jurisdiction, the cause of action and the facts on which the proceedings are based accrued in Kuala Lumpur and the respondents have no place of business in Sabah and Sarawak. I am therefore of the view that this court lacks jurisdiction to hear this application.

[10] In conclusion, I shall dismiss the application. The applicant is to pay costs of RM2,000 to the Federal Attorney General. I shall make no order of costs in favour of the respondents as I have not heard the striking out application.